Superior Protection, Inc. *and* United Government Security Officers of America—Local 229. Case 16–CA–23210

April 23, 2004

ORDER DENYING MOTION

BY MEMBERS LIEBMAN, SCHAUMBER, AND WALSH

The Respondent moves for reconsideration of our February 25, 2004 Decision and Order granting the General Counsel's Motion for Summary Judgment and requiring the Respondent to recognize and bargain with the Union as the representative of the unit certified in Case 16–RC–10361. See 341 NLRB No. 35.[1] In its response to the General Counsel's Motion for Summary Judgment, the Respondent had contended, for the first time, that the certified unit is no longer appropriate because, in May 2002, after the election and consolidated unfair labor practice/challenged-ballot hearing had been held, the Respondent contracted with the General Services Administration (GSA) to provide security services at eight additional facilities within the geographic scope of the three-county unit. The Respondent asserted that the previously unrepresented employees at the eight new locations outnumbered the unit employees 42–29, and would effectively be accreted to the unit pursuant to the Board's bargaining order.

We rejected the Respondent's contention, noting, among other things, that

> the Respondent does not contend that the two groups of employees have been merged or consolidated, thereby completely obscuring their separate identity. Cf. *Renaissance Center Partnership*, 239 NLRB 1247 (1979) (Board processed employer's RM petition, even though it was filed during the certification year, where the certified group of security personnel at the Renaissance Center had been consolidated and intermixed with a larger, unrepresented group of security personnel at a hotel within the same commercial development, the union had filed a unit-clarification petition seeking to accrete the larger group into the unit, and the evidence showed that the groups were now indistinguishable and that the only appropriate unit consisted of the overall security force). [Slip op. at 2–3.]

The Respondent now moves for reconsideration, claiming that a "cursory inquiry" initiated after receipt of the Board's decision revealed that "at the present time," the two groups have, in fact, been "merged and consolidated." The Respondent asserts that the two groups are commonly supervised, perform identical duties, wear identical uniforms, enjoy identical terms of employment, permanently transfer between locations covered by the two GSA contracts, temporarily fill in for one another between locations covered by the first and second GSA contracts, and are otherwise indistinguishable, except that the first GSA contract requires the security officers to wear batons and the second does not. See affidavit of Reginald Jones (Exh. A). The General Counsel has filed an opposition, and the Respondent filed a reply thereto.

Having duly considered the matter, we deny the Respondent's motion for reconsideration. Section 102.48(d)(1) of the Board's Rules permits a party, because of "extraordinary circumstances," to move for reconsideration, rehearing, or reopening of the record after the Board's decision or order. A motion to reopen the record

> shall state briefly the additional evidence sought to be adduced, why it was not presented previously, and that, if adduced and credited, it would require a different result. Only newly discovered evidence, evidence which has become available only since the close of the hearing, or evidence which the Board believes should have been taken at the hearing will be taken at any further hearing.

In order to establish that evidence is "newly discovered," the movant must show facts indicating that it "acted with reasonable diligence to uncover and introduce the evidence" and that it was therefore "excusably ignorant" of the evidence previously. *Fitel/Lucent Technologies*, 326 NLRB 46 fn. 1 (1998). Here, the Respondent generally asserts that it had unspecified conflicts that prevented adequate time for legal research and an investigation into the current status of the two groups of employees. The Respondent also notes that "motions for extension of time were filed and for the most part denied by the Board's Executive Secretary." Motion at 2.

However, as noted by the General Counsel, the Respondent had approximately 3 months from the date of the charge, and 7 weeks from the date of the complaint, to research and investigate the unit issue, before its response to the General Counsel's Motion for Summary

[1] The certified unit is:

INCLUDED: All permanent, full-time and regular part-time security officers assigned to work at GSA contract facilities in Harris, Montgomery and Galveston counties.

EXCLUDED: All office clerical employees, employees on temporary assignment, professional employees, managers and supervisors as defined by the Act.

Judgment was due.[2] Further, as indicated above, the Respondent implicitly acknowledges that a "cursory" investigation could have uncovered the evidence. Thus, we find that the Respondent has failed to carry its burden.[3]

The Respondent has also not shown that the evidence was unavailable prior to the Board's February 25, 2004 Decision and Order. The Respondent states only that: (1) there had been "no significant merging" of the two groups at the time the Union filed a petition to represent the employees at the eight new facilities in January 2003 (see fn. 4, supra); (2) the merger of the two groups occurred "after" that petition was filed; and (3) the two groups are merged "at the present time." The Respondent, however, does not contend that the merger occurred after the Board's February 25 decision.

Finally, it is not clear that the new evidence would require a different result.[4] In *Renaissance Center Partnership*, supra, the Board found that the two previously separate groups of security officers had become indistinguishable in part because the officers were now "randomly assigned to sections of the complex." 239 NLRB at 1247. Here, as indicated above, the Respondent contends only that employees "permanently transfer" and "temporarily fill in for one another" between locations under the first and second GSA contracts. This assertion itself indicates that employees are permanently assigned to a location rather than "randomly assigned." While it also indicates that there is permanent and temporary interchange between locations under the old and new GSA contracts, the Respondent does not reveal how often this occurs.[5]

Accordingly, for all the foregoing reasons, the motion for reconsideration is denied.

Dated, Washington, D.C. April 23, 2004

Wilma B. Liebman, Member

Peter C. Schaumber, Member

Dennis P. Walsh, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

[2] The General Counsel's Motion was filed on January 5, and the Notice to Show Cause issued on January 12. The Executive Secretary's Office granted Respondent a 1-week extension to file a response, to February 2. The Executive Secretary's Office denied the Respondent's second request for an extension of time.

[3] The Respondent also argues that it was the *Region's* responsibility to investigate the matter, pursuant to the new petition filed by the Union in January 2003. The Respondent asserts that the January 2003 petition sought to represent both groups of employees in the same unit. This assertion is incorrect and contrary to the Respondent's own prior response to the General Counsel's Motion for Summary Judgment. As Respondent stated in that response (p. 4), the January 2003 petition specifically states that it is seeking to represent the Respondent's employees in the Houston area at "all sites *other than* locations in 16–RC–10361. See Unit description, case pending before NLRB." Moreover, the Respondent acknowledges that "there was no significant merging" of the two groups of employees at the time the January 2003 petition was filed. Reply at 2. Thus, even if the Region had conducted an investigation at that time, it would not have uncovered the evidence.

[4] Member Schaumber finds it unnecessary to rely on the analysis set out in this paragraph and the accompanying footnote because he finds for the reasons set out above that the Respondent has not established that the evidence it seeks to adduce is newly discovered or has become available only after the Board's February 25, 2004 Decision and Order.

[5] Moreover, the Respondent may have had a bargaining obligation with respect to the permanent and/or temporary transfers (which it presumably would not have satisfied given its general refusal to recognize and bargain with the Union). See generally *J.W. Rex Co.*, 308 NLRB 473, 497–498 (1992), enfd. mem. 998 F.2d 1003 (3d Cir. 1993); *United Technologies Corp.*, 296 NLRB 571, 572 fn. 3 (1989); and *Kansas Education Assn.*, 275 NLRB 638, 639 (1985). If so, this would be an additional reason to find that the evidence of transfers is not a basis to revisit the certification. See *Telemundo de Puerto Rico, Inc. v. NLRB*, 113 F.3d 270, 155 LRRM 2338, 2345 (1st Cir. 1997) (evidence that employees had been recently assigned supervisory duties did not warrant revisiting certification since such changes were made unilaterally and violated the duty to bargain), and cases cited there. Compare *Frito-Lay, Inc.*, 177 NLRB 820 (1969) (Board vacated certification and dismissed 8(a)(5) complaint where employer had instituted nationwide organizational changes based on a management study begun prior to the representation proceeding, which changes eliminated the area managers' autonomy over day-to-day operations, the "essential factor" supporting the Board's finding that a unit limited to three of six districts was appropriate).